IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL WRIT PETITION NO.994 OF 2004

1. Smt. Indumati Wamanrao Dahanukar

2. Pankaj Avinash Dahanukar .. ..Petitioners

Versus

1. Shri Uday Ashok Dahanukar

2. Sameer Sudhakar Nagarkar
3. Hemant Sharad Tarkar
4. State of Maharashtra .. ..Respondents

Mr. Madhav Jamdar for petitioners
Mr. G.S.Godbole for Respondent No.1
Mr. R.Y.Mirza, APP for State

CORAM : S.C.DHARMADHIKARI,J.

DATE : 8TH DECEMBER, 2006

P.C.:

1. By this Petition, under Article 227 of the Constitution of India read with Section 482 of Criminal Procedure Code, Petitioners original accused Nos.2 and 3 are challenging the judgments and orders dated 16th July 2003 passed by the learned Judicial Magistrate, First Class, Pune, below Exhs.35 and 38 in S.C.C.No.138 of 2000 and dated 18th February 2004 of the Addl. Sessions Judge,

Pune in Criminal Revision Application No.802 of 2003. In other words, the challenge is to the orders issuing process to the petitioners to appear and answer the allegations in the complaint in so far as Section 409 read with 120-B of I.P.C.

2. At the outset, it must be mentioned that the complainant (Respondent no.1 herein) and the petitioners original accused nos.2 and 3 are related to each other. Therefore, an attempt was made to explore the possibility of settlement. I had also appointed a Valuer so that all properties could be valued and ultimately the shares ascertained by appropriate further proceedings. However, for some reason the dispute could not be resolved.

3. Therefore, by consent of parties this writ petition is disposed of finally.

4. Shri Jamdar learned counsel appearing for the petitioners submits that the 1st Respondent-original complainant executed a Power of Attorney dated 12th September, 1995 in favour of Respondent no.2-original accused no.1, inter alia, for the purpose of appearance in

all courts and compromising any matter. Shri Jamdar submits that now the original complainant is falsely claiming that this Power of Attorney has been revoked and cancelled by him. He is further falsely alleging that the original Power of Attorney is in his possession. In fact, Power of Attorney was revoked and cancelled by Advocate's notice dated 15th June, 1999 and accordingly a Public Notice was issued on 21st June, 1999. M/s. Dahanukar Constructions filed a Regular Civil Suit No.810 of 1999 and another Suit bearing Regular Civil Suit No.811 of 1999 in the Court of Civil Judge, Junior Division, Pune. The first petitioner also filed a suit being R.C.S.No.317 of 1999.

5. Shri Jamdar submits that parties to Regular Civil Suit No.811 of 1999 filed Consent Terms and order in terms of consent terms was passed on 2nd June, 1999. Similarly consent terms were filed in R.C.S.No.810 of 1999 and order in terms of the consent terms was passed therein as well. The Petitioners thereafter submit that a Compromise Purshis was filed in R.C.S.No.317 of 1999 and Order dated 7th June, 1999 was passed in the said Civil Suit. The learned Judge of Small Causes Court at Pune while passing the order dated 7th June, 1999 recorded court's

satisfaction that the parties have compromised the dispute with free consent.

6. Mr. Jamdar's further submission is that, in any event, the original complainant has filed R.C.S.No.378 of 2000 seeking declaration that the compromise decree passed in R.C.S.No.811 of 1999 on 2nd June, 1999 has been obtained by playing fraud on the court and the original complainant.

7. In such circumstances, there was no warrant for filing a private complaint being RCC No.138 of 2000 alleging offences punishable under Sections 409 and 120B of IPC. Shri Jamdar submits that it is in this background and pursuant to the liberty granted by this court that the application, for recalling issuance of process in this private complaint, was filed by the petitioners herein. These applications filed for discharge/recall of process have been decided by the JMFC, Pune vide order dated 16th July, 2003. He refused to set aside his order of issuance of process. Aggrieved thereby the matter was carried in revision proceedings and even the revision application has been dismissed by the Addl. Sessions Judge. He submits that the complaint read as a whole does not disclose any

offence punishable under Section 409 of IPC. He submits that on a plain reading of Section 409 the same cannot be applied to the facts and circumstances of the present case. More so, when all that has happened is based upon the Power of Attorney civil suits have been compromised and disposed of. Mr. Jamdar has also taken me through the complaint and the public notice. He submits that the Power of Attorney is revoked and cancelled with effect from 15the June, 1999. In such circumstances, it was subsisting on the date of institution of suit and filing of the Compromise Terms. The decree was rightly passed in each of the suit in terms of the compromise arrived at by parties. In any event, proceedings are pending to challenge the decree passed by compromise. In such circumstances, allowing the original complainant to proceed with the complaint is an abuse of process of the court. The complainant’s motive in filing such criminal case is to harass and pressurise the petitioners-original accused. Petitioner no.1 is 88 years of age and cannot be dragged into any such controversies. The entire dispute is over property rights and therefore civil in nature.

8. On the other hand Shri Godbole, learned counsel appearing for the complainant contends that the

Petitioners are not entitled to invoke jurisdiction of this Court under Section 482 of Criminal Procedure Code or under Article 227 of the Constitution of India. Their conduct is such that they are not entitled to invoke discretionary and equitable jurisdiction of this Court. He submits that the criminal complaint read as a whole discloses commission of offences under Section 120-B and 409 of Indian Penal Code. In any event, the Court below has issued process and that order has not been interfered with by the Addl. Sessions Judge. Mr. Godbole has invited my attention to the affidavit in reply filed by 1st Respondent-original complainant. He submits that it is pertinent to note that perusal of the criminal complaint demonstrates that apart from the petitioners, one Samir Sudhakar Nagarkar and Hemant Tarkar are also arraigned as accused. The learned Magistrate has issued process against accused Nos.1 to 4. The order issuing process was sought to be recalled by accused Nos. 1, 2 and 3. These applications were rejected by J.M.F.C. Pune on 16th July, 2003.

9. Revision Application was filed by the present petitioners challenging the orders issuing process and refusing recalling of the same. Thus, it is pertinent to

note that other accused have not challenged these orders. The complaint read as a whole demonstrates that as far as the Special Power of Attorney is concerned, the allegation is that the original complainant executed the Power of Attorney. Original complainant executed the power of attorney in favour of accused no.1. The same was executed at the behest of the present petitioners. The complainant was in United States of America. Upon, return of the complainant from USA he took back the original power of attorney from accused no.1. The allegation is that disputes arose between legal heirs of late Shri Wamanrao L.Dahanukar. There was misappropriation of funds and assets so also the estate by father of Petitioner no.2 and the petitioner no.2. The power of attorney executed in favour of Avinash was revoked by the complainant on 1st April, 1999. He also revoked the power of attorney executed in favour of petitioner no.2 Pankaj on 26th April, 1999.

10. Mr. Godbole has taken me through the complaint and particularly paras 9 to 19 thereof. He has also taken me through the details of the suits compromised by the petitioners.

11. As noted above all accused are not before me to challenge the order issuing process. Petitioners along with other accused had applied for recalling the order of issuing process. The learned JMFC had taken note of the arguments and his order rejecting Exhs.35 and 38 would demonstrate that the submission before him is that the accused No.1 was neither the attorney nor agent. Similarly, there are no prima facie allegations of criminal conspiracy. The arguments proceed on the basis that there is no entrustment of the property by any of the accused nor is there dominion over the same. There is evidence on record in this respect. The learned J.M.F.C. reproduced Sections 120B and 409 and has observed that the allegations are that on the basis of power of attorney accused no.1 initially filed a Caveat Application in the Regular Civil Suit. The Caveat was filed at the instigation and directions so also as part of the conspiracy with other accused. The suit itself appear to be filed collusively. The date of filing of the suit, the date of issuance of notice, the date of acceptance of notice, the date of entering appearance and lastly the date of the compromise decree are all matters which are interconnected and each of the accused had played a specific role therein according to J.M.F.C. Further, the

property cards and other documents filed by the original complainant would show that there is material to substantiate the averments in the complaint. It is in these circumstances, that issuance of process under Section 409 of IPC has been justified. The learned judge has observed that the arguments canvased, involved facts, which have to be gone into details and that is permissible only when the matter is being tried. Once evidence has to be produced to justify the submissions then there is no warrant of recalling the process is his conclusion.

12. The same conclusion has been arrived at by the learned Addl. Sessions Judge, Pune. The learned Judge has upheld the order of JMFC and observed that merely because civil disputes are pending does not mean that there is no element of any criminal liability.

13. From a perusal of both orders and the complaint read as a whole it is apparent that the complainant executed power of attorney in favour of the accused referred to above. The agency or authority thereunder, according to me, does not continue once it is revoked. Thus, the acts have been performed during subsistence of the Power of Attorney or after it was revoked are matters

of evidence. As held by the Supreme Court in the decision reported in AIR 1962 SC 1821 and explained/followed later, the word "Agent" is not restricted to persons who carry on the profession of Agents. The requirement of S.409 would be satisfied if the person be an Agent of another and is entrusted with property or with any Dominion over property in the course of his duties as an Agent. The ingredients are prima facie satisfied in this case. It is not the case of the accused that S.409 would not be attracted in case of Power of Attorney Holder. That he acted within his authority and did not commit breach of the duties assigned thereunder is the plea. That all acts are within the scope of the Agents' Authority and Power is the submission. Surely, when such is the case the complaint cannot be thrown out. It is not disputed that the case of Partners having dominion over property as a result of entrustment is covered by S.409 of I.P.C. That the Petitioners were entrusted as such is also the case.

14. That apart, during its subsistence the power conferred has been misused and abused is the allegation. Thus, serious allegations are made. It is alleged that collusive suits have been filed and decrees obtained thereby taking away the right, title and interest of the

complainant in several properties. The complainant has been deprived of his share in the immovable properties by all accused entering into a conspiracy. The complaint contains specific allegations detailing the Acts and Deeds of Accused No.1. It is alleged that he is acting in conspiracy with the co-accused. The allegation is that all properties have been usurped and the act was complete after the original complainant was ousted from the Bungalow. The Agent instead of protecting his rights in immovable properties, over which he had control, betrayed the trust by acting in conspiracy with the co-accused, is thus, the basis. In such circumstances, I do not find that this is a fit case for exercising the inherent jurisdiction of this Court.

15. All that remains is the submission of Shri Jamdar that the applicant no.1 is a lady aged 88 years. The applicant no.1 is also arraigned as an accused. In my view, mere because she is a lady and aged 88 years, by itself does not mean that process could not have been issued. There are sufficient safeguards and enough protection for a woman accused and senior citizens of such age. It is not as if a court is going to summon them personally at every hearing/stage and they would be

required to attend the proceedings. It is open for the petitioners to seek appropriate reliefs and exemptions from personal appearance. I am of the view that when specific role is attributed to her by the complainant the alternate submission of Shri Jamdar cannot be accepted.

16. In the result, the criminal writ petition fails. It is accordingly dismissed. Ad-interim order stands vacated.

17. At this stage Mr. Jamdar appearing for petitioners prays for continuation of ad-interim order dated 18.7.2006 for a period of eight weeks to enable the petitioners to take appropriate steps.

18. Since, the ad-interim order has been continuing from 18th July 2006 interest of justice would be subserved if the same is continued for a further period of eight weeks.

(S.C.Dharmadhikari, J.)